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Does Labeling the System "Unfair" Threaten Fairness? Trial Publicity Rules for Defense Attorneys in Military Commissions

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INTRODUCTION

Trial publicity has been an issue since the early days of the Republic.¹ The concern at its core involves a balancing between protecting the right to a fair trial and safeguarding the right of free expression.² Trial publicity also implicates important societal interests such as the free dissemination of information, especially concerning the public interests in knowing of threats to safety and information generally concerning judicial proceedings and the public policy involved.³

In adopting the *Model Rules of Professional Conduct* ("Model Rules"), the American Bar Association's ("ABA") has sought to balance these interests.⁴ To that end, Model Rule 3.6 limits the public communications of attorneys during an investigation or litigation.⁵ High-profile cases are most likely to involve concerns under Rule 3.6.⁶ One such case is that of David Hicks of Australia, who was captured in December 2001, in Afghanistan by the Northern Alliance.⁷ Hicks was among the first detainees transferred to Guantanamo Bay, Cuba.⁸ He was

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1. See *United States v. Burr*, 25 F. Cas. 49 (C.C.D. Va. 1807) (expressing concern about Vice President Aaron Burr's ability to get a fair trial for treason after newspapers published affidavits of two prosecution witnesses).

2. MODEL RULES OF PROF'L CONDUCT R. 3.6 cmt. 1 (2004) [hereinafter MODEL RULES] (limiting the type of extrajudicial statements an attorney can make about an ongoing investigation or litigation when the statements pose a substantial risk of unfairly prejudicing the trial).

3. MODEL RULES R. 3.6 cmt. 1.

4. See MODEL RULES R. 3.6 cmt 1.

5. See MODEL RULES R. 3.6.

6. Concerns about trial publicity were especially apparent during the investigation by the Warren Commission into President Kennedy's assassination, the trial of Dr. Sam Sheppard for the murder of his wife, and most notably, the OJ Simpson trial. See Mawiyah Hooker & Elizabeth Lange, Current Development, *Limiting Extrajudicial Speech in High-Profile Cases: The Duty of the Prosecutor and Defense Attorney in Their Pre-Trial Communications with the Media*, 16 GEO. J. LEGAL ETHICS 655, 660 (2003).

7. Elise Labott, *U.S., Australia Reach Detainee Agreement*, CNN.COM, Nov. 26, 2003, <http://www.cnn.com/2003/LAW/11/26/guantanamo.hicks/index.html>.

8. *Id.*

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the first such detainee to be assigned a military defense attorney,⁹ and the third detainee to be charged.¹⁰ Soon after being appointed as defense counsel for Hicks, United States Marine Corps Major Michael Mori called a press conference at which he denounced the military commission as incapable of granting his client a fair and impartial trial.¹¹

This Note will focus on two extrajudicial statements made by Major Mori. Specifically, this Note will analyze the sources and scope of his ethical responsibilities and whether or not those two extra-judicial statements violated these responsibilities. Part I provides a description of Model Rule 3.6 and its competing purposes, as well as a description of the military trial publicity rules.¹² Part II provides a brief history of the military commissions for the Guantanamo detainees and discusses the military commission of David Hicks. Part III analyzes Major Mori's extrajudicial statements under Model Rule 3.6, Navy Rule 3.6, and the various rules specific to practice in military commissions.¹³ Part IV concludes that Major Mori's statements did not violate Model Rule 3.6 and that sanctions against Major Mori for any potential violation under Navy Rule 3.6 or the military commission rules may run afoul of the Constitution.¹⁴

I. TRIAL PUBLICITY RULES

9. See News Release, Department of Defense, DoD Assigns Legal Counsel for Guantanamo Detainee (Dec. 3, 2003), <http://www.defenselink.mil/releases/2003/nr20031203-0721.html> [hereinafter DoD Assigns Legal Counsel].

10. News Release, Department of Defense, Guantanamo Detainee Charged (June 10, 2004), <http://www.defenselink.mil/releases/2004/nr20040610-0893.html>. Hicks was charged with conspiracy to commit war crimes, attempted murder by an unprivileged belligerent, and aiding the enemy. *Id.*

11. Terry Frieden, *Hicks Defense Slams Trial Process*, CNN.COM, Jan. 21, 2004, <http://www.cnn.com/2004/LAW/01/21/australian.guantanamo/index.html>.

12. AIR FORCE RULES OF PROF'L CONDUCT R. 3.6 (2005) [hereinafter AIR FORCE RULES]; RULES OF PROFESSIONAL CONDUCT FOR LAWYERS R. 3.6 (1992) [hereinafter ARMY RULES]; PROF'L CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL R. 3.6 (2004) [hereinafter NAVY RULES].

13. See MODEL RULES R. 3.6; NAVY RULES R. 3.6; Appointing Authority Regulation No. 3 of Nov. 17, 2004, Professional Responsibility, <http://www.defenselink.mil/news/Nov2004/d20041118reg3.pdf> (establishing policy for ethical conduct of attorneys before, during, and after trial by military commission) [hereinafter AAR-3]; Military Commission Instruction No. 4 of Sept. 16, 2005, Responsibilities of the Chief Defense Counsel, Deputy Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel, 32 C.F.R. § 13 ¶ 5 (2006), available at <http://www.defenselink.mil/news/Oct2005/d20051003MCI4.pdf> [hereinafter MCI-4]. Military Commission Instructions are issued by the General Counsel of the Department of Defense and take effect upon the signature of the General Counsel. 32 C.F.R. § 10.4 (2006).

14. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

Every military attorney is required to be admitted to a state bar, and military attorneys are subject to both the ethical requirements of their respective state bars and their respective military services.¹⁵ The following discussion considers these rules as they relate to trial publicity.

A. MODEL RULE 3.6¹⁶

Model Rule 3.6 includes a general rule against trial publicity, but strives to strike a balance among the interests of the defendant, the attorney, and the public. According to Model Rule 3.6(a):

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.¹⁷

The Rule governs the conduct of lawyers who are involved or have been involved in an investigation or litigation, and includes in this group

15. See 10 U.S.C. 827(b) (2005) (requiring trial and defense counsel for military courts to be a member of a state bar. The Air Force Rules state that they "appl[y] to all military and civilian lawyers . . . in the Air Force Judge Advocate General's Corps." AIR FORCE RULES R. 8.5. The Army Rules state that they "apply to Judge Advocates in the Active Army, the Army National Guard, and the U.S. Army Reserve." ARMY RULES R. 8.5(b). Paragraph 4(b) of JAG Instruction 5803.1C that contains the Navy Rules defines "covered attorney" as including all attorneys "who practice law or provide legal services under the cognizance and supervision of the [Navy] JAG," including all Navy and Marine Corps judge advocates. JAG Instruction 5803.1C of Nov. 9, 2004, Professional Conduct of Attorneys Practicing under the Cognizance and Supervision of the Judge Advocate General, ¶ 4(b), http://www.jag.navy.mil/Instructions/5803_1c.pdf [hereinafter JAG Instruction].

16. The ABA's *Model Rules* are not binding on attorneys unless adopted by their state bar and promulgated by the highest court in the state. The author does not know what state bar Major Mori is licensed by, and no attempts were made to discover that information in the interests of keeping the analysis at a more general level. While every attorney practicing before the military commission is subject to the military commission rules and every military attorney is subject to their respective service's rules, only a small number of attorneys will be subject to the same particular state bar rules. This is because of the few numbers of military attorneys working in military commissions, and because those military attorneys can be licensed in any of the states or territories of the U.S. Additionally, a majority of the state bar rules are substantially similar to Model Rule 3.6. See *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1068 n.1 (1991) (Rehnquist, J., concurring) (citing the degree to which states have adopted Model Rule 3.6—16 states verbatim and 11 states with minor modifications).

17. MODEL RULES R. 3.6(a).

lawyers in the same firm or government agency.¹⁸ Model Rule 3.6 only prohibits extrajudicial statements when the lawyer "knows or reasonably should know"¹⁹ that 1) the information will be publicly communicated and 2) "will have a substantial²⁰ likelihood of materially prejudicing an adjudicative proceeding in the matter."²¹ Model Rule 3.6 provides three different factors to aid in determining whether this "substantial likelihood test" is implicated. First, part (b) of the Rule provides a list of types of information that a lawyer may publicly communicate, with six types of information that are generally applicable and four additional types applicable only to criminal trials.²² Second, Comment five 5 to Model Rule 3.6 provides a list of six improper types of extrajudicial statements.²³

18. MODEL RULES R. 3.6(d); *see also* MODEL RULES R. 3.6 cmt. 3 (recognizing both the value of informed public commentary and the minimal risk of prejudice posed by commentary from a lawyer not involved in the proceeding).

19. MODEL RULES R. 1.0(f) ("[K]nows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."); MODEL RULES R. 1.0(j) ("Reasonably should know' . . . denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.").

20. MODEL RULES R. 1.0(l) ("Substantial' . . . denotes a material matter of clear and weighty importance.").

21. MODEL RULES R. 3.6(a).

22. MODEL RULES R. 3.6(b). The complete text follows:

Notwithstanding paragraph (a), a lawyer may state:

- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
- (2) information contained in a public record;
- (3) that an investigation of a matter is in progress;
- (4) the scheduling or result of any step in litigation;
- (5) a request for assistance in obtaining evidence and information necessary thereto;
- (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
- (7) in a criminal case, in addition to subparagraphs (1) through (6):
 - (i) the identity, residence, occupation and family status of the accused;
 - (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
 - (iii) the fact, time and place of arrest; and
 - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

MODEL RULES R. 3.6(b).

23. MODEL RULES R. 3.6 cmt. 5. The text of the improper subjects includes:

- (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
- (2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or

Finally, Comment 6 considers the importance of the nature of the proceeding in determining whether extrajudicial statements will prejudice the proceeding, finding criminal jury trials to be the most sensitive to extrajudicial statements.²⁴

Model Rule 3.6 does contain an exception for extrajudicial statements made to protect a client from undue prejudicial effect of adverse publicity.²⁵ This exception requires that: (1) the adverse publicity was not initiated by the lawyer or client; (2) a "reasonable lawyer" would believe a statement is required to protect the client from "substantial undue prejudicial effect;" and (3) the statement is limited to the information necessary to mitigate the recent adverse publicity.²⁶

Rule 3.6 addresses a number of competing interests, most notably a balance between a defendant's right to a fair trial and an attorney's right to free expression.²⁷ The rule is based on the following three grounds.

First, a defendant's right to a fair trial is threatened when the impartiality of the decision-maker is threatened.²⁸ One of the ways that a decision-maker can be improperly influenced is by being presented in a public forum with information that is not admissible at trial.²⁹ Such publicity can essentially serve as an end-run around the evidentiary requirements of a fair trial and the requirement that a verdict or judgment

contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

- (3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
- (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
- (5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or
- (6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

MODEL RULES R. 3.6 cmt. 5.

24. MODEL RULES R. 3.6 cmt. 6.

25. MODEL RULES R. 3.6(c) ("Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity."); *see also* MODEL RULES R. 3.6 cmt. 7.

26. MODEL RULES R. 3.6(c).

27. *See* MODEL RULES R. 3.6 cmt. 1.

28. *See* MODEL RULES R. 3.6 cmt. 1.

29. *See* MODEL RULES R. 3.6 cmt. 1.

be based on the record at trial.³⁰ Generally, the concern is greater with respect to a jury trial than a bench trial, because judges are seen as more immune to extrajudicial influences and because they often make exclusionary decisions on evidence that they likewise are required to discount.³¹ Some ABA commentators, however, have concluded that even judges and prosecutors may not be able to maintain neutrality in the face of sustained media pressure.³² Because of the greater constitutional protections afforded criminal defendants, preventing trial publicity is even more critical in criminal trials.³³

Second, the constitutionally guaranteed freedom of expression is implicated whenever the government limits expression.³⁴ Model Rule 3.6 limits what an attorney can say outside of the courtroom.³⁵ In a divided opinion, the Supreme Court in *Gentile v. State Bar of Nevada*³⁶ held that the substantial likelihood of material prejudice test created an appropriate balance between an attorney's freedom of speech and the State's interest in fair trials.³⁷ The Court also held that, as interpreted by the Nevada Supreme Court, Rule 177 was void for vagueness.³⁸ In a highly publicized case, *Gentile*, a defense attorney, called a press conference the day after his client was indicted on criminal charges under Nevada law.³⁹ In that press conference, *Gentile* attacked the motivations of the prosecutors and claimed the detective was more likely to have committed the crimes

30. See MODEL RULES R. 3.6 cmt. 1.

31. See MODEL RULES R. 3.6 cmt. 6.

32. See Jonathan M. Moses, Note, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion*, 95 COLUM. L. REV. 1811, 1821 (1995) (citing the AM. BAR ASS'N, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS 77 (1966)).

33. See MODEL RULES R. 3.6 cmt. 6 ("Criminal jury trials will be most sensitive to extrajudicial speech.").

34. See U.S. CONST. amend. I.

35. MODEL RULES R. 3.6.

36. *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). Justice Kennedy delivered the opinion of the Court with respect to Parts III and IV, and Chief Justice Rehnquist delivered the opinion of the Court with respect to Parts I and II. *Id.* at 1032.

37. *Id.* at 1076 (Rehnquist, C.J.) ("While supported by the substantial state interest in preventing prejudice to an adjudicative proceeding . . . the Rule is limited on its face to preventing only speech having a substantial likelihood of materially prejudicing that proceeding.").

38. *Id.* at 1048 (Kennedy, J.).

As interpreted by the Nevada Supreme Court, the Rule is void for vagueness, in any event, for its safe harbor provision, Rule 177(3), mislead petitioner into thinking that he could give his press conference without fear of discipline. Rule 177(3)(a) provides that a lawyer "may state without elaboration . . . the general nature of the . . . defense."

Id.

39. *Id.* at 1063 (Rehnquist, J.).

charged.⁴⁰ The statements appeared in local newspapers, and a local jury trial took place approximately six months later.⁴¹ After Gentile's client was acquitted on all charges, the Nevada state bar disciplined Gentile for his extrajudicial statements.⁴²

Finally, Model Rule 3.6 also addresses the social interest in the release of information about trials to the public.⁴³ Specifically, Comment 1 highlights the public's right "to know about threats to its safety and measures aimed at assuring its security."⁴⁴ Additionally, the comment points to a public interest in the conduct of judicial proceedings, especially when those proceedings have "direct significance in debate and deliberation over questions of public policy."⁴⁵

B. ARMY, NAVY, AND AIR FORCE RULE 3.6

In addition to the ethical obligations imposed by their respective state bars, military attorneys are also subject to the rules of professional conduct of their respective service.⁴⁶ After the adoption of the *Model Rules* in 1983, and the subsequent adoption of similar rules in many states, the armed services confronted differing ethical standards for its attorneys licensed in any one of fifty-four different jurisdictions.⁴⁷ In light of conflicting ethical duties and given the unique nature of the practice of law in a military context, the armed services created their own rules of professional conduct using the *Model Rules* as a starting point.⁴⁸ While the ethical requirements of each armed service are similar to the *Model Rules*, they have been tailored for the practice of law in a military environment.⁴⁹

40. *Id.* at 1059 (Kennedy, J.). In his opening statement, Gentile claimed that the Las Vegas District Attorney's office was not

honest enough to indict the people who did it; [sic] the police department, crooked cops. . . . There is far more evidence that Detective Scholl took these drugs and took these American Express Travelers' checks than any other human being. . . . I feel that Grady Sanders is being used as a scapegoat to try to cover up for what has to be obvious to people at the Las Vegas Metropolitan Police Department and at the District Attorney's office.

Id.

41. *Id.* at 1064 (Rehnquist, C.J.).

42. *Id.*

43. See MODEL RULES R. 3.6 cmt. 1.

44. MODEL RULES R. 3.6 cmt. 1.

45. MODEL RULES R. 3.6 cmt. 1.

46. See *supra* note 15.

47. See Bernard P. Ingold, *An Overview and Analysis of the New Rules of Professional Conduct for Army Lawyers*, 124 MIL. L. REV. 1, 7 n.41 (1989).

48. See *id.* at 7-8.

49. See *id.* at 8.

The Air Force, Army, and Navy all have a trial publicity rule similar to Model Rule 3.6.⁵⁰ Air Force Rule 3.6 is identical to Model Rule 3.6, except that it does not incorporate the changes made to the general rule in 3.6(a) in the 2003 revision of the *Model Rules*.⁵¹ The discussion following the rule states that all Air Force members must comply with applicable laws and regulations in making any kind of public statements.⁵²

The Army and Navy Rule 3.6 are based on the *Model Code of Professional Responsibility* as amended in 1978.⁵³ The Navy Rules apply to both Navy and Marine Corps attorneys.⁵⁴ Looking first at the general rule, Navy Rule 3.6(a) is substantially similar to Army Rule 3.6(a):

A covered attorney shall not make an extrajudicial statement about any person or case pending investigation or adverse administrative or disciplinary proceedings that a reasonable person would expect to be disseminated by means of public communication if the covered attorney knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding or an official review process thereof.⁵⁵

Both services include the substantial likelihood test that is substantially the same as Model Rule 3.6 with the following three exceptions.⁵⁶ First, for

50. See AIR FORCE RULES R. 3.6; NAVY RULES R. 3.6; ARMY RULES R. 3.6.

51. Compare MODEL RULES R. 3.6(a), with AIR FORCE RULES R. 3.6(a). The textual revisions to MODEL RULES R. 3.6(a) made in 2003 are available at <http://www.abanet.org/cpr/e2k-rule36.html>:

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a ~~reasonable person would expect to be~~ the lawyer knows or reasonably should know will be disseminated by means of public communication ~~if the lawyer knows or reasonably should know that it~~ and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

52. AIR FORCE RULES R. 3.6 (citing as examples in the discussion following the rule the following: Air Force Instruction 51-201, the Freedom of Information Act, the DoD Freedom of Information Act Program, the Privacy Act, the Air Force Privacy Act Program, and the Victim and Witness Protection Act).

53. ARMY RULES R. 3.6 cmt.; NAVY RULES R. 3.6 cmt. 2.

54. JAG Instruction, *supra* note 15, ¶ 4(b)(1)(a).

55. NAVY RULES R. 3.6(a). Both the Army and Navy broaden the scope by not limiting the application of the rule as Model Rule 3.6 does to "[a] lawyer who is participating or has participated in the investigation or litigation of a matter" MODEL RULES R. 3.6(a). Instead, each service applies its trial publicity rule to every attorney covered by its professional responsibility rules, regardless of participation in the same investigation or litigation. See ARMY RULES 3.6(a); NAVY RULES R. 3.6(a).

56. See ARMY RULES R. 3.6(a); NAVY RULES R. 3.6(a).

their list of permissible statements, the two services provide the same basic six types of permissible statements as in Model Rule 3.6(b), but make the list more restricted by adding the qualifier "without elaboration" after "a lawyer . . . may state" ⁵⁷ Second, for their list of impermissible statements, both services include an additional seventh type of impermissible statement for those that relate to "the credibility, reputation, motives, or character of civilian or military officials of the Department of Defense." ⁵⁸ Finally, the Navy's 2004 amendments to its rules included a change to the text of its list of impermissible statements to add the parenthetical "(including before a military tribunal or commission)" after "a criminal matter" for when a statement is likely to have a prejudicial effect. ⁵⁹

The services also differ from each other in terms of the exception for mitigating adverse publicity ⁶⁰ and from Model Rule 3.6 in terms of additional protections for information. ⁶¹ First, the Navy provides an exception to the general rule in 3.6(d) that is substantially similar to the Model Rule 3.6(c), ⁶² while the Army includes no such exception to its rule. ⁶³ Second, both services add a provision to Rule 3.6 to highlight that other laws and regulations govern and may further restrict what information can be released as well as who may release that information. ⁶⁴

Because state bar rules and military service rules differ, conflicts will inevitably result. ⁶⁵ Conflicts are resolved by giving primacy to the service-specific rules over the rules of the licensing authority for conduct in the course of official responsibilities for the military attorney. ⁶⁶ Given the likely similarity of the two sets of rules when applied, the difference in practice may actually be more one of interpretation. ⁶⁷ Cases involving

57. Compare MODEL RULES R. 3.6(b), with ARMY RULES R. 3.6(c), and NAVY RULES R. 3.6(c).

58. See ARMY RULES R. 3.6(b)(7); NAVY RULES R. 3.6(b)(7). Army Rule 3.6(b)(7) limits this provision with a second sentence stating "[t]his does not preclude the lawyer from commenting on such matters in a representational capacity" and provides an example in the comment of an "administrative hearing where such matters are relevant." ARMY RULES R. 3.6(b)(7); see ARMY RULES R. 3.6 cmt. The Navy Rule 3.6 does not contain either the language in the second sentence or any discussion of Rule 3.6(b)(7) in the comment. NAVY RULES R. 3.6(b)(7); see NAVY RULES R. 3.6 cmts. 1-5.

59. Memorandum from the Research and Civil Law Branch of the U.S. Marine Corps Staff Judge Advocate (undated), <http://sja.hqmc.usmc.mil/jar/files/PR%20Instruction.pdf> (last visited Feb. 12, 2006); NAVY RULES R. 3.6(b).

60. Compare NAVY RULES R. 3.6(d), with ARMY RULES R. 3.6.

61. Compare NAVY RULES R. 3.6(e), and ARMY RULES R. 3.6(d), with MODEL RULES R. 3.6.

62. See NAVY RULES R. 3.6(d).

63. See ARMY RULES R. 3.6.

64. See ARMY RULES R. 3.6(d); NAVY RULES R. 3.6(e). The Air Force provides a similar provision in its discussion following Rule 3.6. AIR FORCE RULES R. 3.6.

65. See, e.g., ARMY RULES R. 8.5(f).

66. See, e.g., ARMY RULES R. 8.5(f)(1).

67. See ARMY RULES R. 8.5 cmt.

conflicting rules for military attorneys have spawned a range of ethics decisions from bar organizations. These decisions have ranged from granting deference to military rules to mandating state rules for military law practice.⁶⁸

II. TRIAL PUBLICITY IN MILITARY COMMISSIONS CONTEXT

As the U.S. moves forward with trying suspected terrorists in military commissions, ethical issues surrounding trial publicity have proved to be novel and complex. Part A provides a brief legal history of the recent use by the U.S. of military commissions to try suspected terrorists held in Guantanamo Bay, Cuba. Part B introduces the military commission of David Hicks and a number of extrajudicial statements made by the detailed defense attorney, Marine Major Michael Mori. Part C concludes with a discussion of the special ethical obligations of practicing in a military commission, including a brief look at the issue of civilian attorneys practicing in military commissions.

A. MILITARY COMMISSIONS FOR GUANTANAMO DETAINEES

On November 13, 2001, President George W. Bush signed a military order that allowed suspected members of al Qaeda or those who have been involved in acts of international terrorism to be tried by military commission.⁶⁹ U.S. Defense Secretary Donald Rumsfeld announced the rules for conducting the military commissions on March 21, 2002, and amended those rules on August 31, 2005.⁷⁰ The Department of Defense ("DoD") charged the first two Guantanamo detainees on February 24, 2004.⁷¹ On December 10, 2004, the Appointing Authority for military commissions, John Altenburg, announced a stay of the military commissions after Salim Ahmed Hamdan, a Yemeni citizen and one of

68. See ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1074 (1982) (holding that military lawyers working in close proximity to opposing military counsel and a military lawyer serving as counsel when the prosecutor, investigating officer, or judge exercises command authority over the lawyer are improper). In this same decision, the Committee determined that in certain circumstances, situations arising in a military context would lead to allowing actions that would not be acceptable in a civilian court. *Id.*

69. President's Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2002), *available at* <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>.

70. News Release, Dep't of Def., Secretary Rumsfeld Announces Military Commission Rules (Mar. 21, 2002), http://www.defenselink.mil/releases/2002/b03212002_bt140-02.html; see Military Commission Order No. 1 of Aug. 31, 2005, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, <http://www.defenselink.mil/news/Sep2005/d20050902order.pdf> [hereinafter MCO-1].

71. News Release, Dep't of Def., Two Guantanamo Detainees Charged (Feb. 24, 2004), <http://www.defenselink.mil/releases/2004/nr20040224-0363.html>.

four detainees formally charged at the time, succeeded in having his trial by military commission declared unlawful by the U.S. District Court for the District of Columbia.⁷² The District Court's decision was later overturned by the U.S. Court of Appeals for the District of Columbia Circuit on July 15, 2005, clearing the way for the military commissions to begin again.⁷³ On July 18, military commissions for the Guantanamo detainees restarted after the lifting of the stay.⁷⁴ Mr. Altenburg issued an order on September 20 for Australian David Hicks' trial to resume.⁷⁵ On November 7, the U.S. Supreme Court granted certiorari to consider the decision of the Court of Appeals in *Hamdan v. Rumsfeld*,⁷⁶ and on November 14, the District Court granted a stay on military commission proceedings for Hicks until the Supreme Court issues a "final and ultimate decision" in the *Hamdan* case.⁷⁷

B. UNITED STATES V. HICKS

On July 3, 2003, President Bush determined that David Hicks of Australia, along with six other detainees, was subject to his Military Order of November 13, 2001, allowing them to be tried by military commission.⁷⁸ Northern Alliance forces captured Hicks in Afghanistan in December 2001, while he was allegedly fighting alongside al Qaeda and Taliban forces against United States-led Coalition forces.⁷⁹ He was one of the first detainees transferred to Guantanamo Bay, Cuba and remains in detention there pending conclusion of his trial.⁸⁰ He is charged with conspiracy, attempted murder by an unprivileged belligerent, and aiding the enemy.⁸¹

72. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 173 (D.D.C. 2004) (holding that Hamdan's trial by military commission was unlawful unless military commission rules were amended concerning his potential exclusion from sessions and withholding evidence from him).

73. *Hamdan v. Rumsfeld*, 415 F.3d 33, 44 (D.C. Cir. 2005).

74. News Release, Dep't of Def., Military Commissions To Resume (July 18, 2005), <http://www.defenselink.mil/releases/2005/nr20050718-4063.html>.

75. Kathleen T. Rhem, *Military Commission Proceedings To Resume for 'Australian Taliban'*, AM. FORCES PRESS SERVICE, Sept. 21, 2005, http://www.defenselink.mil/news/Sep2005/20050921_2807.html.

76. *Hamdan v. Rumsfeld*, 126 S.Ct. 622, 623 (2005).

77. See *Hicks v. Bush*, 397 F. Supp. 2d 36, 45 (D.D.C. 2005).

78. News Release, Dep't of Def., President Determines Enemy Combatants Subject to His Military Order (July 3, 2003), <http://www.defenselink.mil/releases/2003/nr20030703-0173.html>.

79. Department of Defense Military Commissions Charge Sheet, United States v. David Matthew Hicks, <http://www.defenselink.mil/news/Jun2004/d20040610cs.pdf> (last visited Feb. 13, 2006) [hereinafter Charge Sheet].

80. See Frieden, *supra* note 11.

81. See Charge Sheet, *supra* note 79.

On December 3, 2003, the DoD announced U.S. Marine Corps Major Michael Mori's appointment as David Hicks's detailed defense counsel.⁸² Soon after being assigned as defense counsel, Major Mori called a press conference on January 21, 2004, at which he sharply criticized the military commissions.⁸³ Specifically, he stated that "[t]he military commissions will not provide a full and fair trial The Commission process has been created and controlled by those with a vested interest only in convictions."⁸⁴ Major Mori complained specifically about rules that disallowed tribunal judges from dismissing charges and the lack of appeals to civilian courts.⁸⁵ He also raised the concern that the tribunals themselves might lead adversary nations to use the same process on U.S. soldiers or contractors serving abroad.⁸⁶ Although the media claimed that someone had filed a complaint about these statements, no information is available about who filed the complaint and what, if any, action was taken as a result.⁸⁷ The Navy did, however, subsequently revise its rules of professional conduct in November of 2004, including a revision to its trial publicity rule.⁸⁸

Major Mori has not spoken about the details of the conduct of his client or any evidence that he has seen, limiting his attacks to the unfairness he perceives in the process and the alleged mistreatment of his client.⁸⁹ An additional complaint, however, by an official in the Office of Military Commissions called into question Major Mori's ethics for publicly alleging that Hicks may have been abused during his detention without first filing a complaint with U.S. authorities.⁹⁰ Other military defense attorneys have cast these and other threats of ethical violations as

82. DoD Assigns Legal Counsel, *supra* note 9.

83. *See* Frieden, *supra* note 11.

84. John Mintz, *Lawyer Criticizes Rules for Tribunals; Trials Won't Be Fair, Military Attorney Says*, WASH. POST, Jan. 22, 2004, at A3.

85. *Id.*

86. *Id.*

87. *AM: US Govt Threatens to Investigate Hicks Lawyer* (Austral. Broadcasting Corp. radio broadcast June 21, 2004), transcript available at <http://www.abc.net.au/am/content/2004/s1136422.htm> [hereinafter Austral. Radio].

88. Memorandum from the Research and Civil Law Branch of the U.S. Marine Corps Staff Judge Advocate (undated), <http://sja.hqmc.usmc.mil/jar/files/PR%20Instruction.pdf> (last visited Feb. 12, 2006). It is unclear what relationship Major Mori's extrajudicial statements had to the revision of the Navy Rules, although given the nature of the changes made, it appears likely that they played some role in the revision. *Id.*

89. The discussion in this Part covers all of the major types of extrajudicial statements made by Major Mori. *See* discussion *supra* Part II.B. The author was unable to find any instances of public statements of Major Mori relating to the specifics of his client's conduct or of the evidence that he has seen.

90. Austral. Radio, *supra* note 87. David Hicks detailed this alleged abuse in a sworn affidavit on August 5, 2004, that was released publicly on December 10, 2004. *See The David Hicks Affidavit*, SYDNEY MORNING HERALD, Dec. 10, 2004, available at <http://www.smh.com.au/news/World/David-Hicks-affidavit/2004/12/10/1102625527396.html> [hereinafter Hicks Affidavit].

harassment and intimidation of the defense office.⁹¹ Major Mori has continued to be outspoken about military commissions, most recently branding the August 2005 changes to the military commissions as being:

[T]otally cosmetic. It's totally for show. It's because they realise [sic] that no-one in the world accepts it as a fair system and are desperate to convince somebody. You can slap a new coat of paint on the outside of a house with broken foundations, but it doesn't fix the problem.⁹²

C. MILITARY COMMISSION RULES

In addition to the state and military rules of professional conduct, military attorneys practicing in military commissions incur professional obligations to comply with all rules, regulations, and instructions applicable to trials by military commission.⁹³ The duties of the detailed military defense counsel are to "defend the Accused zealously within the bounds of the law . . . and [t]o represent the interests of the Accused in any review process"⁹⁴ The military commission rules present two additional policies relating to trial publicity: prohibition on disclosure of protected information and regulation of statements to the media.⁹⁵ First, the prohibition on disclosures of protected information applies to all military commission defense counsel and prohibits improper disclosure of "classified information, national security information, or state secrets to an Accused or potential Accused or to any person not specifically authorized to receive such information."⁹⁶ Second, the military commission rules provide that the sole release authority for DoD information is the Assistant Secretary of Defense for Public Affairs, and that any defense counsel member may only communicate with the media about cases or other military commission matters with the approval of either the Appointing Authority or the General Counsel of DoD.⁹⁷ In case of a conflict between the military commission rules and those of the service or bar jurisdiction, the Appointing Authority can only apply the military commission rules after coordination with the conflicting service and/or bar jurisdiction.⁹⁸

91. Austrl. Radio, *supra* note 87.

92. *Lawyers Dismiss Guantanamo Changes*, AGE, Sept. 1, 2005, available at <http://www.theage.com.au/news/World/Lawyers-dismiss-Guantanamo-changes/2005/09/01/1125302652467.html> (last visited Feb. 14, 2006).

93. AAR-3, *supra* note 13, ¶ 3(A).

94. MCO-1, *supra* note 70, ¶ 4(C)(2).

95. MCI-4, *supra* note 13, ¶ 5.

96. *Id.* ¶ 5(B).

97. *Id.* ¶ 5(C).

98. AAR-3, *supra* note 13, ¶ 3(C).

While not the focus of this Note, a number of civilian attorneys also represent David Hicks before the military commission.⁹⁹ These civilian American and Australian attorneys face a different set of ethical obligations.¹⁰⁰ While civilian attorneys practicing in tribunals conducted pursuant to the Manual for Courts-Martial or the Uniform Military Code of Justice ("UCMJ") may be suspended from such practice for violation of the applicable service rules,¹⁰¹ the military commissions are conducted pursuant to Military Commission Order 1 ("MCO-1") under which service rules do not apply to civilian defense attorneys.¹⁰² To participate in a military commission, however, civilian defense attorneys for detainees are required to "sign[] a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the course of proceedings."¹⁰³ While certain portions of military commission proceedings may be closed to both the Accused and civilian defense counsel, the military defense counsel may not be excluded from any trial proceeding.¹⁰⁴ Within the context of the *Hicks* military commission, however, this is not likely to be an issue because the U.S. conceded in an agreement with the Australians that the prosecution did not intend to rely on closed proceedings in its case-in-chief.¹⁰⁵

III. THE EXTRAJUDICIAL STATEMENTS AND THE ETHICS RULES

Major Mori is subject to the ethics rules of his state bar, the Navy, and the military commissions.¹⁰⁶ Therefore, his extrajudicial statements must be analyzed under these rules.

A. MODEL RULE 3.6

99. *Hicks v. Bush*, 397 F. Supp. 2d 36, 37 (D.D.C. 2005) (listing four firms and one sole practitioner in addition to Major Mori as attorneys for David Hicks).

100. Commission rules allow civilian attorneys to represent detainees at no cost to the government if they meet certain requirements, including signing an agreement to be bound by the military commission rules. MCO-1, *supra* note 70, ¶ 4(C)(3).

101. *See, e.g.*, ARMY RULES R. 8.5 cmt.

102. *See* MCO-1, *supra* note 70, ¶ 4(C)(3).

103. *Id.* ¶ 4(C)(3)(b); *see also* Military Commission Instruction No. 5 of April 30, 2003, Qualification of Civilian Defense Counsel ¶ 3(A)(2)(e), 32 C.F.R. § 14 (2006), available at <http://www.defenselink.mil/news/Feb2004/d20040220milcominstno5.pdf>.

104. MCO-1, *supra* note 70, ¶ 6(B)(3); *see also id.* ¶ 4(C)(3)(b) ("The qualification of a Civilian Defense Counsel does not guarantee that person's presence at closed Commission proceedings or that person's access to any information protected under Section 6(D)(5)."); *id.* ¶ 5(K) ("Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof.").

105. News Release, Dep't of Def., U.S. and Australia Announce Agreements on Guantanamo Detainees (Nov. 25, 2003), <http://www.defenselink.mil/releases/2003/nr20031125-0702.html>.

106. *See supra* notes 15-16, 93 and accompanying text.

In light of the text and purpose of Model Rule 3.6, it does not seem likely that Major Mori breached an ethical duty with his extrajudicial statements.¹⁰⁷ Certainly, he seems to meet the rule's three-part test triggering the trial publicity prohibition: he is a lawyer involved in the litigation, he made extrajudicial statements related to that litigation, and he reasonably knew the information would be publicly disseminated.¹⁰⁸ While the preceding requirements are almost certainly met here, both types of statements are likely to fail the substantial likelihood test when measured against the three aids to interpretation provided in Model Rule 3.6.¹⁰⁹

First, looking at the permissive statements provided in Model Rule 3.6, the criticism of the military commission process and personnel involved could potentially be considered part of the defense or even information contained in a public record.¹¹⁰ The allegations of abuse of his client could also be considered part of the defense involved.¹¹¹ It is also possible, however, that other claims of abuse were already part of the public record because of allegations made by others who have discussed the alleged abuse, such as Hicks himself or his father.¹¹² While Hicks claims to have made the allegations to the International Committee of the Red Cross both in Afghanistan and in Cuba, it is unclear whether any allegations of abuse were made public before Major Mori made the allegations of abuse.¹¹³

Second, looking at the list of impermissible statements provided in the comment to Model Rule 3.6, neither type of extrajudicial statement seems to fit within the list.¹¹⁴ Although the allegations of abuse might qualify as "information that the lawyer knows . . . is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial,"¹¹⁵ the standard for admitting evidence in the military commissions is extremely broad, as any evidence that "would have probative value to a reasonable person" is generally admitted.¹¹⁶ It is also unclear whether allegations of abuse posed any risk of prejudicing a

107. See discussion *supra* Part I.A.

108. See discussion *supra* Part I.A.

109. See *supra* text accompanying notes 20-24.

110. See MODEL RULES R. 3.6(b) ("[A] lawyer may state: (1) the . . . defense involved . . . [and] . . . (2) information contained in a public record . . ."); see also *supra* note 84 and accompanying text.

111. See *supra* notes 90 and 110 and accompanying text.

112. See Hicks Affidavit, *supra* note 90.

113. See *supra* note 90 and accompanying text.

114. See MODEL RULES R. 3.6 cmt. 5; see *supra* notes 84 and 90 and accompanying text.

115. See MODEL RULES R. 3.6 cmt. 5.

116. MCO-1, *supra* note 70, ¶ 6(D)(1).

trial, especially since the allegations were made to the Australian government and to the Australian press, not to U.S. media sources.¹¹⁷

Finally, looking at the type of proceeding involved, this case is probably subject to the highest concern for regulation by Model Rule 3.6.¹¹⁸ The military commission trial of David Hicks is best characterized as a criminal trial, especially since a finding of guilt could result in imprisonment up to a life sentence.¹¹⁹ In addition, the presiding officer has many of the attributes of a judge and the panel members are similar to a jury.¹²⁰ While this case presents the highest concern for the rule, the two statements are unlikely to be found to pose a substantial likelihood of material prejudice because they can be reasonably characterized as part of the defense, and it is unclear that such information would be inadmissible in a military commission.¹²¹

Even though Major Mori's statements do not appear to fall under the general rule,¹²² the exception to the general rule of Model Rule 3.6 may provide an additional justification for the extrajudicial statements.¹²³ This exception recognizes that ensuring a fair trial may require the defense to respond to trial-related negative publicity of the defendant initiated by the prosecution or by a third party.¹²⁴ Neither of Major Mori's statements, however, is likely to fall within the exception because Major Mori did not offer them to mitigate adverse publicity.

Looking to the underlying interests of free expression, a fair trial, and public information protected by Model Rule 3.6,¹²⁵ Major Mori's extrajudicial statements do not seem to violate the rule. His client, after all, has a right to a full and fair trial.¹²⁶ In this case, there does not seem to be an inherent conflict between the defendant's trial rights and the attorney's first amendment rights. Instead, the interests of both seem to point in favor of the extrajudicial statements. Also, the public interest here in knowing information about the commission process, especially any

117. See *Austrl. Radio*, *supra* note 87. While it may seem obvious that any statement made to Australian media would be picked up quickly by American media, the author did not find that that was the case. In fact, specific details about Major Mori's statements were often only available through Australian media sources.

118. See MODEL RULES R. 3.6 cmt. 6.

119. See MCO-1, *supra* note 70, ¶ 6(G) (authorizing a sentence of the death penalty, life imprisonment, or lesser term); see *Labott*, *supra* note 7.

120. News Release, Dep't of Def., Secretary Rumsfeld Approves Changes to Improve Military Commission Procedures (Aug. 31, 2005), <http://www.defenselink.mil/releases/2005/nr20050831-4608.html>; MODEL RULES R. 3.6 cmt. 6 (stating that criminal jury trials are the most sensitive to extrajudicial statements).

121. See *supra* text accompanying notes 20-24.

122. MODEL RULES R. 3.6(a).

123. MODEL RULES R. 3.6(c).

124. MODEL RULES R. 3.6(c).

125. MODEL RULES R. 3.6 cmt. 1.

126. MCO-1, *supra* note 70, ¶ 1 (providing that provisions will be construed to provide individuals with a full and fair trial).

inherent flaws in the process, is significant given the public policy concerns involved in the War on Terrorism, extended detention operations, interrogation techniques, and fair trials of war criminals.¹²⁷ A permissive view towards Major Mori's extrajudicial statements is the approach that best advances the three interests protected by Model Rule 3.6.¹²⁸

B. NAVY RULE 3.6

Evaluating Major Mori's statements against the more stringent requirements of the Navy Rules may result in a different, and controlling, result. The analysis of the general rule is the same as that under Model Rule 3.6 above. The substantial likelihood test, however, is bolstered under the Navy Rules because the statements critical of the military commissions personnel seem to fall squarely within the additional impermissible statement of Navy Rule 3.6(b).¹²⁹ Specifically, Major Mori's statements critical of the military commission personnel both refer to "a criminal matter (including before a military tribunal or commission)" and relate to "the credibility, reputation, motives, or character of civilian or military officials of the Department of Defense," which is impermissible under Navy Rule 3.6(b)(7).¹³⁰ His statement that "[t]he Commission process has been created and controlled by those with a vested interest only in convictions"¹³¹ certainly seems to deal directly with the motives and character of the senior military and civilian DoD officials who initiated and run the military commissions.¹³² Just because his statements may fall within one of the impermissible statements, however, does not imply an automatic ethical violation. The list of impermissible statements only provide a guide to what type of statements would have a substantial likelihood of material prejudice,¹³³ and the criticism of DoD officials does not objectively appear to present any likelihood of material prejudice.¹³⁴

This impermissible type of statement is unique to the Army and Navy Rules, although the Army provides a qualifying statement that allows such comments in a representational capacity.¹³⁵ Navy and Marine Corps

127. See MODEL RULES R. 3.6 cmt. 1.

128. See MODEL RULES R. 3.6 cmt. 1.

129. See NAVY RULES R. 3.6(b).

130. See NAVY RULES R. 3.6(b)(7).

131. Mintz, *supra* note 84.

132. See NAVY RULES R. 3.6(b)(7).

133. See *supra* notes 20-24 and accompanying text.

134. See NAVY RULES R. 3.6(b). The text of the rule merely states that such a statement "ordinarily is likely to have such a[] [prejudicial] effect." *Id.*

135. See NAVY RULES R. 3.6(b)(7); ARMY RULES R. 3.6(b)(7) (including a second sentence stating that "[t]his does not preclude the lawyer from commenting on such matters in a representational capacity"). The comment to Army Rule 3.6 further explains this representational exception as "a lawyer properly acting in a representational capacity,

attorneys are the only attorneys practicing before a military commission subject to this preclusion of their speech without an exception.¹³⁶ It is unclear why criticism of any DoD official would materially prejudice a criminal tribunal, and the comment to the rule provides no explanation for this exceptional and broadly-worded provision.¹³⁷ The type of statement precluded does not appear to relate directly to the concerns which the Navy's trial publicity rule seeks to balance—the defendant's right to a fair trial, the attorney's right to free speech, and the public's interest in judicial proceedings.¹³⁸ Further, any sanction imposed on this ground is likely to be found void for vagueness because of the high risk of discriminatory enforcement given the facts of this case.¹³⁹ Here, as in *Gentile*, the comments were in a "political forum" and "directed at public officials and their conduct"¹⁴⁰ The *Gentile* Court recognized that the danger of discriminatory enforcement is heightened when, as is the case here, "one of the classes most affected by the regulation is the criminal defense bar, which has the professional mission to challenge actions of the State."¹⁴¹

C. MILITARY COMMISSION RULES

Neither of the two additional trial publicity requirements of the military commission rules is likely to provide productive grounds for challenge to the extrajudicial statements.¹⁴² First, while the military commission rules prohibit the disclosure of protected information, each of the military service rules already prohibits such disclosure.¹⁴³ Second, while the regulation of statements to the media may be an area of potential violation, sanctions for a facial violation would face constitutional, ethical, and public policy scrutiny.¹⁴⁴ No public information is available about whether or not Major Mori had the required approval of either the Appointing Authority or the General Counsel of DoD before making any of his statements. Making statements without such approval would likely result in potential ethical violations for Major Mori.¹⁴⁵ However, the

e.g. before an administrative hearing where such matters are relevant." ARMY RULES R. 3.6 cmt. This representational exception is not likely to cover any extrajudicial statements given the example provided of an administrative hearing.

136. See NAVY RULES R. 3.6(b)(7); ARMY RULES R. 3.6(b)(7).

137. See ARMY RULES R. 3.6 cmt.; NAVY RULES R. 3.6 cmts. 1-5.

138. See NAVY RULES R. 3.6 cmt. 1.

139. See *Gentile v. State Bar*, 501 U.S. 1030, 1051 (1991) (finding that the impermissible vagueness allowed for possible discriminatory enforcement, especially when those most affected are the criminal defense attorneys and the speech in issue involves criticism of the government).

140. *Id.* at 1034.

141. *Id.* at 1051.

142. See *supra* notes 84, 90, 95-97 and accompanying text.

143. See *supra* notes 64, 95-97 and accompanying text.

144. See MCI-4, *supra* note 13, ¶ 5(C).

145. See *id.*

requirement of prior approval for public statements may be constitutionally suspect under *Gentile v. State Bar of Nevada*.¹⁴⁶ The rule requiring prior approval has the impact of restricting certain types of statements, but that restriction is not limited to a test such as the substantial likelihood test that was found to be constitutional under *Gentile*.¹⁴⁷ Without that limitation, refusing to grant approval to make extrajudicial statements may be seen as a violation of free speech.¹⁴⁸ This restriction on speech may also implicate Major Mori's ability to fulfill his ethical duty to "defend the Accused . . . zealously within the bounds of the law" ¹⁴⁹ In any case, pursuing sanctions for any such violation is likely not only to raise constitutional and ethical concerns, but also policy considerations. Any sanction of Major Mori's statements is likely to weaken, rather than strengthen, the U.S. and international perception of the fairness and impartiality of the military commissions. Because none of the Guantanamo detainees are American citizens and they are being held outside the United States, the international community has an interest in the judicial process for the detainees in addition to the American public. Actions taken to silence or punish this speech will likely be seen as an effort to conceal issues in the system, and the perceived cover-up may be seen as worse than any alleged unfairness in the military commissions.

CONCLUSION

Major Michael Mori, detailed defense counsel for Australian detainee David Hicks, has made at least two sets of extrajudicial statements that have resulted in concerns of potential ethical violations. Specifically, Major Mori publicly criticized the Department of Defense officials involved with military commissions as being interested only in convictions.¹⁵⁰ Additionally, he made allegations that David Hicks had been abused while detained directly to the Australian government and press.¹⁵¹ Major Mori faces a myriad of ethical obligations arising from his his state bar,¹⁵² the Navy, and the military commissions. First, under Model Rule 3.6, neither of his statements meets the substantial likelihood test required of the general rule even under a higher concern provided that the trial is similar to a criminal trial. Second, under Navy Rule 3.6, his first statement probably violates a provision unique to the Navy that makes criticism of any DoD official an impermissible type of statement, but that provision does not seem to belong in a trial publicity rule and is

146. See *Gentile*, 501 U.S. 1030.

147. See *supra* note 37 and accompanying text.

148. See *supra* note 37 and accompanying text.

149. MCI-4, *supra* note 13, ¶ 3(D)(2).

150. Mintz, *supra* note 84.

151. See *supra* note 90 and accompanying text.

152. Model Rule 3.6 is used in this Note in place of the actual trial publicity rule of Major Mori's state bar. See *supra* note 16.

not likely to survive constitutional scrutiny. Third, under the military commission rules, any potential sanctions for a possible violation concerning a lack of prior permission to speak to the media may face constitutional, ethical, and political barriers. Finally, the fundamental interests that underlie all of the trial publicity rules of a defendant's right to a fair trial, an attorney's right to free speech, and the public's right to information about judicial proceedings all seem to line up in favor of the extrajudicial statements in this case.¹⁵³ While the substance of his public comments may continue to earn him criticism for any number of reasons, Major Mori's extrajudicial statements do not seem to merit sanction with respect to any of the trial publicity or military commission rules.

153. See *supra* notes 125-128 and accompanying text.